Supreme Court, U.S.
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No. _____
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In The
Supreme Court of the United States

JOHNNY PARTAIN,
Petitioner

v.

MARVIN ISGUR, Individually and in his capacity as Bankruptcy Judge; UNITED STATES OF AMERICA; COMPASS BANK; BBVA USA BANCSHARES, INC.; BBVA INVESTMENTS, INC.; BBVA USA, INC.; BBVA BANCOMER, SA; INSTITUCION DE BANCA MULTIPLE; GRUPO FINANCIERO BBVA BANCOMER; JAMES MAPLES; KATHLEEN MAPLES; ATLAS TRANSPORTATION, INC.,
Respondents

On Petition For Writ Of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. After dismissal of a federal cause of action, when is it's respective federal case dead, un-amendable, and appealable?

2. How does absolute immunity apply to a bankruptcy judge whom has been adjudge to be without subject matter jurisdiction and continues to cause injury?

3. Is the United States responsive to a RICO claim through FTCA?

CORPORATE DISCLOSURE STATEMENT

Atlas Transportation, Inc. (previously known as Global Limo, Inc.) is a legal Texas corporation currently recorded with the Texas Secretary of State as Atlas Transportation, Inc. There is no parent corporation or publicly held company owning 10% or more of the corporate stock.

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JURISDICTION

On July 28, 2010, the Fifth Circuit Court of Appeals entered a non-published summary Opinion in case no. 09-41129 and immediately ordered a mandate thereof. This Supreme Court has jurisdiction to review the Opinion and orders in case no. 09-41129 per 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS PERTINENT TO THE CASE

18 U.S.C § 1964(c), Civil Remedies –

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

28 USC § 1331, Federal question –

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 USC § 1343, Civil Rights –

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 USC § 1356, Seizures –

The district courts shall have original jurisdiction, exclusive of the courts of the States, of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

28 U.S.C. §2201 - (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as

determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 USC § 2202, Further Relief –

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

28 U.S.C. § 2674. Liability of United States –

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

28 U.S.C. § 2680(h), Exceptions –

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346 (b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

STATEMENT OF THE CASE

On or about January 29, 2007, Johnny Partain filed his *Original Declaratory Petition and Complaint For Injunctive Relief* (USCA5 87-93) and Exhibits (USCA5 8-86), through *Partain v. Isgur,* case no. 07-CV-016, in the Southern District of Texas, asking for a declaratory judgment on a bankruptcy order made without subject matter jurisdiction in bankruptcy adversary case no. 05-BK-07009, and requesting emergency relief as a legal defense against unlawful and unconstitutional incarceration from Bankruptcy Judge Isgur whom had ordered a contempt hearing immediately following the 5th Circuit Court of Appeals' dismissal of Mr. Partain's complaint of fraud and racketeering in two courts.[1] See 5th Circuit Court of Appeals, Docket No. 07-05-351-0010 Judge Isgur and 07-05-351-0011 Judge Crane. The jurisdiction for the declaratory

[1]District Judge Randy Crane recused himself from Partain v. Isgur, case no. 07-cv-016.

petition was founded under 28 USC § 1343, Civil Rights; 28 USC § 1331, Federal question; 28 USC § 1356, Seizures; 28 USC § 1334, Bankruptcy Cases; 28 USC § 1367, Supplemental Jurisdiction; and per Federal Rules of Civil Procedure 57 was also proper under 28 USC § 2201 and 28 USC § 2202. While the original declaratory petition was specifically intended to protect Mr. Partain from immediate judicial incursions outside the bankruptcy court's jurisdiction, it is based on a long history of associated complaints and connections to concurrent civil litigations by other parties in interest in Texas courts through causes numbered CL-29,530-A, C-16504-C, CL-40,430-C, CL-43,538-D, C-2365-05-F, C-2495-05-I, C-2366-05-E, 2005-70990, 2005-65697, C-2434-05-A, and MDL 05-1073: Cause MDL 05-1073 is multidistrict litigation which consolidates many other civil cases (for the purpose of pretrial process) whose complaints principally revolve around the death of 23 people in September of 2005 pursuant to the burning of a chartered bus operating under the alleged authority of a private corporation Atlas Transportation, Inc., also known as Global Limo, Inc., whose operation and assets had been seized by Bankruptcy Judge Isgur: Atlas Transportation, Inc. was neither a debtor nor a creditor in any bankruptcy cases.

The District Court failed to respond to Mr. Partain's *Original Declaratory Petition and Complaint For Injunctive Relief* in *Partain v. Isgur*, case no. case no. 07-CV-0016 (Rec. USCA5 87), and as a consequence Mr. Partain was illegally incarcerated at a federal detention center for 72 days until he sued out a habeas corpus in *Partain v. Bravo*, case no. 07-CV-092 in the Southern District of Texas on showing that the order he was alleged to breach did not exist and that Judge Isgur lacked jurisdiction over the subject matter. After release, the District Court, in *Partain v. Isgur*, indicated that Bankruptcy Judge Isgur enjoyed absolute immunity from any lawsuits - so Mr. Partain's petition evolved more into a Biven's claim. App. 4, 5. The

District Court ordered a hearing and on October 4, 2007, dismissed Mr. Partain's cause of action against Judge Isgur on basis of absolute immunity.

Hitherto, Mr. Partain met appeal and other courts' deadlines while illegally incarcerated and had in fact made his fourth attempt for federal review of the bankruptcy court's lack of jurisdiction to seized his business or remove his right to sue or counter-sue Texas State Bank and prior bankrupt employees: The Courts in case numbers 05-BK-07009, 05CV257, and 06CV137 avoided reviewing Judge Isgur's jurisdiction and failed to "prove up" the bankruptcy court's jurisdiction although this was the main purpose of the cases. On July 3, 2008, the 5th Circuit published its amended opinion in Matter of Maples, 529 F.3d 670 (5th Cir. 2008) regarding the appeal of District Court case no. 06-CV-137 and Bankruptcy Court adversary case no 05-BK-07009. App. 2. A majority of the 5th Circuit summary panel recorded that they were unwilling to make a decision in the case and affirmed that there was no reversible error in the District Court case, but Circuit Judge Emilio Garza found in unopposed dissent that it was well established law that Bankruptcy Judge Isgur lacked subject matter jurisdiction - Judge Garza insisted that the opinion be published. District Judge Crane was also unable to find subject matter jurisdiction for Judge Isgur in the intrinsically related habeas corpus case *Partain v. Bravo*, case no. 07CV092. App. 9.

Mr. Partain concurrently went through the tort claims process pursuant to the Federal Tort Claims Act while carefully maintaining some prosecutory action in *Partain v. Isgur*. Mr. Partain successfully retrieved his business, home, and restored his standing to sue Texas State Bank through Turnover Order No. 5 in Hidalgo County Court, case no. CL-29,530-A, *Partain v. Maples*, on August 18, 2008. App. 7. With legal standing restored and tort claims

ripe, Mr. Partain filed his *First Amended Petition*, a complex action with personal liabilities, official liabilities, and other potential FTCA considerations (depending on the yet to be determined standing of the Defendants) covering tort claims and RICO claims, and requiring the addition of all actors thereto: The *First Amended Petition* directly related back to circumstances of the Original Petition in *Partain v. Isgur* and was consequently filed thereto. The judge presiding over Partain v. Isgur, responded to case documents on an "annual basis" and eventually struck Mr. Partain's amended petition on a non-existent failure to receive the Court's permission to amend, presumably under FRCP 15 (rev. 2007) (there was never a responsive pleading in *Partain v. Isgur* and Mr. Partain did request the Court's permission as a precaution). App. 6. *Partain v. Isgur* was appealed to the 5th Circuit Court of Appeals and begot *Partain v. Isgur* et al, case no. 09-41129, based on three issues. The issues submitted are that -

1. *Partain v. Marvin*, case no. 07-cv-0016 is a live case;
2. Mr. Partain is entitled to amend his petition freely and he did so in a timely manner pursuant to federal law and respecting statutes of limitations;
3. Mr. Partain is entitled to have his complaints heard through meaningful and unprejudiced process; and
4. Mr. Partain is entitled to summary judgment

The 5th Circuit did not directly respond to Mr. Partain's issues; but the Court did summarily affirm that the bankruptcy judge has absolute immunity, implicated that case no. 07-cv-0016 could not have proceeded further without approval of the District Court through FRCP 60, and recited a prospective judgment against Mr. Partain's stricken claims under the Federal Tort Claims Act. App. 1.

ARGUMENT

This petition for writ of certiorari is necessary to clarify when a federal case is dead, un-amendable, and appealable; to determine why absolute immunity may apply to a bankruptcy judge whom has been adjudge to be without subject matter jurisdiction and continues to cause injury; and to determine if the United States is responsive to a Racketeering Influenced Corrupt Organization, 18 U.S.C. § 1961–1968, and a claim through Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680. It is necessary to ultimately determine if Mr. Partain has any recourse in the judiciary.

1. After dismissal of a federal cause of action, when is its respective federal case dead, un-amendable, and appealable? FRCP 41 (b) provides that Partain v. Isgur, case no. 07-cv-0016 (the district case) is not adjudicated on the merits by stating that -

> *"Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule — except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 — operates as an adjudication on the merits.*

The district case's cause of action was succinctly dismissed without a review of it's merits by determination of the District Court through oral hearing that it lacked jurisdiction pursuant Judge Isgur's claim of absolute, or alternately, qualified immunity. App. 3. Judge Isgur and the United States never filed a responsive pleading in the district case. These circumstances appeared to preserve FRCP 15 (rev. 2007) and Mr. Partain's right to amend his petition. Mr. Partain continued active prosecutory actions to keep the district case alive, with annual responses from the Court as was the typical character of the litigation. Rec USCA5 1, Civil Docket For Case #: 7:07-cv-00016. Mr. Partain prosecuted an appeal from the bankruptcy court in

the 5th Circuit, case no. No. 07-40385, responsive to his challenge of the bankruptcy court's subject matter jurisdiction, and also filed his federal tort claims pursuant to the Federal Tort Claims Act to add responsive parties to his *First Amended Petition*. In fact, Mr. Partain was able to complete the requirements under the FTCA, to complete litigation in the 5th Circuit, and to timely file an amended petition per FRCP 15 (rev. 2007) before the district court ever got around to ordering any final and appealable order closing the case. This worked serendipitously with Mr. Partain's efforts to file the *First Amended Petition* for old and new injuries he was receiving, because the amended petition related back to the circumstances surrounding the original petition and filing the amended petition there economized the litigation since any claims to immunity would not be collateral attacks and could not be ambiguous: Note that the District Court actually had jurisdiction of the original petition under 28 U.S.C. 2201, but it was a moot error after Mr. Partain amended his petition with the force of the order from the 5th Circuit demonstrating that Judge Isgur did not have jurisdiction. See *In re Maples*, 529 F.3d 670 (5th Cir. 2008)(dissent). So was the district case a dead case or is a case dead when litigation is unable to continue?

In *Benjamin*, 833 F.2d 669 (7th Cir), the Court states, "*We previously have held that the simple dismissal of complaint does not terminate the litigation. Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1111 (7th Cir.1984), cert. denied, 470 U.S. 1054, 105 S.Ct. 1758, 84 L.Ed. 821 (1985); Peterson Steels, Inc. v. Seidmon, 188 F.2d 193, 194 (7th Cir.1951). In contrast, a dismissal of the entire action ends the litigation and forces the plaintiff to choose between appealing the judgment or moving to reopen the judgment and amend the complaint pursuant to Fed.R.Civ.P. 59 or Rule 60. Car Carriers, 745 F.2d at 1111; see Swam v. United States, 327 F.2d 431, 433 (7th. Cir.), cert. denied, 379 U.S. 852, 85 S.Ct. 98, 13 L.Ed.2d 55 (1964).*

The present 5th Circuit opinion, *Partain v. Isgur*, case no. 09-41129, takes an unjustly narrow and disparate view of the appeal before it by ignoring the district case's processes and it's substance, and by denying Partain any substantive review of his grievances. Specifically, the 5th Circuit jumped over the main issue Mr. Partain presented regarding the amendable nature of his complaints. The Appeals Court based its entire opinion on a FRCP 60 motion and judicial discretion as if a final order had been rendered. The 5th Circuit opinion erred in citing *Vielma v. Eureka Co.*, 218 F.3d 458, 468 (5th Cir. 2000)(litigant did not reopen a final judgment), and seems to be oblivious to how a dismissal order over a cause of action for lack of jurisdiction does not qualify as a final order. The 5th Circuit avoided the greater issue regarding the application of the federal rules of civil procedures to Partain's right to redress his grievances which requires a stricter de novo standard of review. Partain did make a FRCP 60 motion in the District Court to prove an official record after entry of judgment in the 5th Circuit demonstrating that the Declaratory Judgment and other relief he petitioned for in the district court was within the Court's jurisdiction regardless to claims of judicial immunity, and should be heard:[2] A party may prove an official record — or an entry or lack of an entry in it by any other method authorize by law (FRCP 44 (c)) and FRCP 60 seemed most appropriate at the time. The District Court did not order a dismissal of the case or a judgment for or against Mr. Partain responsive to FRCP 54 and 58, properly leaving Mr. Partain with the option of amending his complaints and continuing the litigation or not, consistent with other circuits. Kaba v. Stepp, 458 F.3d 678 (7th Cir. 2006); Hoskins v. Poelstra, 320 F.3d 761, 763 (7th Cir.2003) ("if an

[2] Partain did not need to reargue the law in his FRCP 60 motion because it was moot point being that a published order from the 5th Circuit found Judge Isgur lacking jurisdiction and being that Partain was again damaged through the District Court's failure to respond

amendment would be unavailing, then the case is dead in the district court and may proceed to the next tier."); Sault Ste. Marie Tribe of Chippewa Indians v. State of Mich., 5 F.3d 147 (6th Cir. 1993); see also FRCP 15 (a) (1) (rev. 2007) and 28 U.S.C. 1653. Because a final judgment had never been entered by the Court, Partain never had the right to appeal the dismissal order until there was some kind of finality: If a dismissal order (for lack of jurisdiction) can't be appealed and another case must be started, at what point does a litigant enjoy due process and/or invoke review of the inferior court's orders?

2. How does absolute immunity apply to a bankruptcy judge whom has been adjudge to be without subject matter jurisdiction and continues to cause injury? The 5th Circuit opinioned in case no. 09-41129 that Bankruptcy Judge Isgur is absolutely immune to suit. Contrarily, the 5th Circuit also published an adequate opinion that it was well established law that Bankruptcy Judge Isgur was acting without jurisdiction.[3] See Matter of Maples, 529 F.3d 670 (5th Cir. 2008) (dissent): This opinion is the only review of the bankruptcy judge's jurisdiction after four federal cases wherefrom Mr. Partain consistently complained of the judge's lack of jurisdiction. The Supreme Court found in Stump v. Sparkman, 435 U.S. 357 (quoting Bradley v. Fisher, 13 Wall. 335, 351 (1872)), that judicial immunity does not attach if the judge is acting in the clear absence of all jurisdiction, and yet the 5th Circuit's instant opinion is

[3] The 5th Circuit also failed to fully review Matter of Maples, 529 F.3d 670, when it erred in determining that Partain's claims against additional defendants are predicated on the same facts as those asserted in an earlier appeal which was affirmed in the additional defendants' favor by this court. Specifically, Partain's standing to complain was illegally removed and placed into the seized corporation by the bankruptcy court. His claims' and defenses were stricken without adjudication so that res judicata did not apply. App. 8, Maples v. Partain, case no. 05-70128, Memorandum Opinion On Summary Judgment. Partain later restored his standing to sue through Turnover Order No. 5. See sworn affidavit in Rec. USCA5 589, USCA5 390.

contrary to this Supreme Court's commands without further explanation.

The 5th Circuit also proposes that "The FTCA expressly excludes from its waiver of sovereign immunity any claim "arising out of . . . false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights." 28 U.S.C. § 2680(h). This is consistent with the logic that the United States does not pay it's employees or officers to engage in these activities, and these intentional torts are usually beyond the scope of their employment or discretion, so it is unclear how 28 U.S.C. § 2680(h) acts as to bar Partain's *First Amended Petition*. The government will not replace said employees or officers for their personal liabilities where qualified immunity doesn't exist and the FTCA does not constitute an "exclusive" remedy. Civil rights or constitutional violation ultra vires would be a personal liabilities and not an exclusive remedy under FTCA. However, the 5th Circuit's prospective opinion to defeat Partain's *First Amended Petition* does not reflect these truths and does no justice to the complexity of the claims therein. The 5th Circuit's opinion does not elucidate how exceptions under 28 U.S.C. § 2680(h) blanket the bankruptcy judge with immunity. The opinion may be easily interpreted to enable tortfeasors and their cohorts, operating under official government titles, a free ticket to harm citizens and evade the law; and this is poor public policy.

Partain's petitions are not simple slap on the wrist and forget complaints. No - the district case represents a fully vested atrocity with tremendous damages and subsisting burdens intrinsically defeating good public policy. Partain has had all his causes of action for Declaratory relief, Injunctive relief, Habeas Corpus relief, Bivens relief, and relief under FTCA dismissed or stricken. He has been

illegally incarcerated in a federal detention center on manufactured contempt findings (see Rec. USCA5 54, Affidavit), his standing to sue has been illegally removed to prevent him from making complaints of fraud and racketeering in Maples v. Partain, case no. 05-BK-07009, while his property was seized and absconded resulting in serious injury to the public and to the property; and Mr. Partain still bears a $94,500 criminal sanction burden as ordered by a second bankruptcy judge to vindicate Bankruptcy Judge Isgur although Mr. Partain has never committed a crime doesn't have a criminal history nor has ever even faced a jury. How does a bankruptcy judge maintain absolute immunity, while inflicting said continuing damages against a citizen he pulled into his court? What is the last say of the United States Judiciary on this continuing egregious behavior?

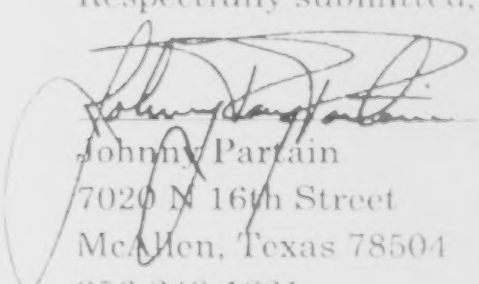
Either the 5th Circuit of Appeals has exceptional reason why lack of subject matter jurisdiction found in their decision (Matter of Maples, 529 F.3d 670 (5th Cir. 2008)) does not pierce Bankruptcy Judge Isgur's absolute immunity per Stump v Sparkman, 435 U.S. 349 (1978), or the appeals court has caused to be raised a more profound question. Do judicial officers as a class enjoy the same absolute immunity as a judicial officer per se; or does the very act of cooperation and meeting of minds between absolutely immune actors, even if they are capable of acquiring the jurisdiction necessary to act, destroy the very foundation of the theory supporting absolute immunity by raising that class above the law and beyond review? Courts exist to assure each individual that he, as an individual, has enforceable rights that he may pursue to achieve a peaceful redress of his legitimate grievances. Nixon v. Fitzgerald, 457 U.S. 731 (1982) (dissenting); Marbury v. Madison, 5 U.S. 163 (supra). Intervention by this Court has become a necessity.

3. Is the United States responsive to a RICO claim through FTCA? According the 5th Circuit's opinion, case no. 09-41129, there is no recovery against the United States under the RICO statues and no waiver of the government's immunity. See also McNeily v. United States, 6 F.3d 343, 350 (5th Cir. 1993). However the United States Supreme Court *In Tafflin v. Levitt*, 493 U.S., 107 L.Ed 2d 887, 110 S. Ct. 792 (1990), unanimously ruled that state courts have concurrent jurisdiction over RICO claims. Under the Federal Tort Claims Act, the United States waives it's sovereign immunity and shall be liable in the same manner and to the same extent as a private individual under like circumstances. 28 U.S.C §2674. The predicate acts need not be the crux of the cause of action and merely need to be committed in furtherance of the illegal scheme. 18 U.S.C § 1964(c), Civil Remedies. Accordingly, the United States is responsive to a RICO claim.

PRAYER

Whereas Premises Considered, Johnny Partain petitions this Court to review Partain v. Isgur, case no. No. 09-41129, in the United States Courts of Appeals for the 5th Circuit; and to adjudge the substance of the questions tendered therein and herewith; and to provide Mr. Partain an opportunity to substantively redress his grievances in the United States Judiciary. Mr. Partain prays for all other relief he is entitled under law and equity.

Respectfully submitted,



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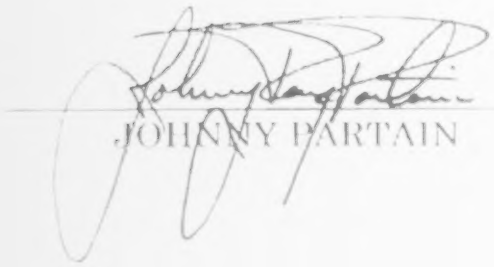
VERIFICATION

I, Johnny Partain, verify that I have personal knowledge of the statements made in the above Petition For Writ Of Certiorari and do hereby swear they are correct and true as represented under the penalty of perjury pursuant to 29 U.S.C. §1746.

Executed this day October 24, 2010.



JOHNNY PARTAIN

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-41129

Summary Calendar

JOHNNY PARTAIN, Individually and doing business as Anti-Corruption Lawsuit Fund, Plaintiff – Appellant

v.

MARVIN ISGUR, Individually and in his capacity as Bankruptcy Judge; UNITED STATES OF AMERICA; COMPASS BANK; BBVA USA BANCSHARES, INC.; BBVA INVESTMENTS, INC.; BBVA USA, INC.; BBVA BANCOMER, SA; INSTITUCION DE BANCA MULTIPLE; GRUPO FINANCIERO BBVA BANCOMER; JAMES MAPLES; KATHLEEN MAPLES; ATLAS TRANSPORTATION, INC., Defendants - Appellees

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Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:07-CV-16

Before KING, STEWART, and HAYNES, Circuit Judges.

PER CURIAM:*

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Johnny Partain ("Partain") appeals the district court's denial of his Federal Rule of Civil Procedure Rule 60(b) motion and its striking of his proposed amended complaint. For the following reasons, we affirm.

I. BACKGROUND

Partain, proceeding pro se, filed a complaint naming United States Bankruptcy Judge Marvin Isgur as the sole defendant. The complaint asked the district court to overturn a ruling adverse to Partain which had been entered by Judge Isgur, the presiding judge in a

bankruptcy adversary action where Partain was a party. Partain's complaint also sought an injunction removing Judge Isgur from further participation in the bankruptcy proceedings involving Partain. Finally, Partain alleged a Bivens claim against Judge Isgur seeking unspecified damages from him personally, damages which Partain alleged arose out of the judgment issued by Judge Isgur. More specifically, Partain alleged Judge Isgur had, by virtue of that ruling and the enforcement of the ruling, caused injury to him "including but not exclusive to loss of life, property, and civil rights."

In response to Partain's complaint, Judge Isgur filed a motion to dismiss, contending he was entitled to a dismissal of the action based upon, inter alia, absolute judicial immunity. After a hearing, the district court judge agreed and dismissed Partain's case on October 4, 2007. Approximately one week later, Partain filed a motion for reconsideration which was denied by the district court. On October 3, 2008, Partain filed a Rule 60(b) motion indicating that he disagreed with the district court's previous determination that Judge Isgur was entitled to judicial immunity, but stated he did not intend to "reargue the law in this motion."

On January 23, 2009, while Partain's Rule 60(b) motion was pending and no order reviving the case and allowing for pleading amendment had been entered, Partain filed an amended complaint, which purported to add the United States and several other private parties as defendants. Partain's various counts against the United States and Judge Isgur included negligence, invasion of privacy, fraud, false imprisonment, conspiracy, and racketeering (RICO), all of which allegedly gave rise to personal liability on the part of the Judge Isgur and liability under the Federal Tort Claims Act ("FTCA") on the part of the United States. On September 30, 2009, the district court, in two orders, struck the amended complaint, as having been filed without leave and denied the Rule 60 motion. Partain appeals both the

order denying his Rule 60(b) motion and the district court's striking of his amended petition.

II. DISCUSSION

A post-judgment amendment is permissible only when the judgment is vacated pursuant to Federal Rule of Civil Procedure 59 or 60. Vielma v. Eureka Co., 218 F.3d 458, 468 (5th Cir. 2000). Thus, only if the district court erred in its denial of Partain's Rule 60(b) motion could there be any error in its striking of Partain's proposed amended complaint. "The decision to grant or deny 60(b) relief lies in the sound discretion of the district court and will be reversed only for an abuse of that discretion." Provident Life & Accident Ins. Co. v. Goel, 274 F.3d 984, 997 (5th Cir. 2001). Rule 60(b) allows a court to relieve a party from a final judgment based on:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged . . . ; or (6) any other reason justifying relief.

FED. R. CIV. P. 60(b). There is nothing in Partain's motion which suggests that relief is appropriate under the first five grounds listed in Rule 60(b). Partain is thus left with attempting to fall within the last possible basis, the general, catchall ground of "any other reason that justifies relief." FED. R. CIV. P. 60(b)(6).

To prevail on a Rule 60(b) motion, a litigant needs to show that there was something wrong with the original ruling or that whatever was previously wrong with his claim can be remedied with pleading amendments, and therefore the litigant should be relieved from the consequences of the court's ruling. See, e.g., Parker v. Bd. Of Supervisors Univ. of La. Lafayette, 335 F. App'x 465, 466 (5th Cir. 2009) (unpublished). Here,-Partain demonstrates nothing that suggests that the district court's

dismissal of Judge Igsar on grounds of absolute judicial immunity was improper. Neither his Rule 60(b) motion nor his proposed first amended complaint sets forth any additional facts or legal grounds which would suggest Judge Isgur is not entitled to absolute judicial immunity. Furthermore, reopening the case and allowing Partain to add new claims against the United States would have been futile and a waste of judicial resources, since those claims also lacked legal merit. The FTCA expressly excludes from its waiver of sovereign immunity any claim "arising out of . . . false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights." 28 U.S.C. § 2680(h). This means all of the counts in Partain's proposed first amended complaint alleging that Judge Isgur's actions constituted or resulted in fraud, the denial of due process, false arrest and/or imprisonment, and interference with Partain's various property and contract rights, are expressly precluded from coverage by the FTCA.

Furthermore, the United States has not, in the FTCA or elsewhere, waived sovereign immunity with regard to alleged civil rights or constitutional violations, i.e., violations of due process. See FDIC v. Meyer, 510 U.S. 471, 475–79 (1994); see also Affiliated Prof'l Home Health Care Agency v. Shalala, 164 F.3d 282, 286 (5th Cir. 1999) ("This Court has long recognized that suits brought against the United States brought under the civil rights statute are barred by sovereign immunity."). Finally, to the extent Partain seeks to recover against the United States under the RICO statute, no waiver of the government's immunity extends to such laws. See McNeily v. United States, 6 F.3d 343, 350 (5th Cir. 1993).

Similarly, reopening the case and allowing Partain to add new claims against the other additional defendants named in the proposed amendment would have also been futile since those claims lacked legal merit as well. Partain's claims against those additional defendants are predicated on the same facts as those asserted in an earlier

appeal which was affirmed in the additional defendants' favor by this court. See In re Maples (Maples v. Partain), 529 F.3d 670 (5th Cir. 2008). Under these circumstances, the district court did not abuse its discretion by denying Partain's Rule 60(b) motion. Nor did the district court err by striking Partain's proposed amended complaint.

III. CONCLUSION

For the foregoing reasons, we affirm the district court's judgment.

Entered July 28, 2010.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-40385

In the Matter of: JAMES H MAPLES; VIRGINIA KATHLEEN MAPLES
Debtors
JAMES H MAPLES; VIRGINIA KATHLEEN MAPLES; TEXAS STATE BANK Appellees
v.
JOHNNY PARTAIN Appellant

Appeal from the United States District Court
for the Southern District of Texas

Before REAVLEY, JOLLY, and GARZA, Circuit Judges.
PER CURIAM:

The opinion issued in this case on May 30, 2008, is withdrawn and this revised opinion is substituted therefor. Appellant Johnny Partain, proceeding pro se, raises twenty-seven issues in this appeal from the district court's affirmance of the bankruptcy court's final judgment in this adversary proceeding. After considering the briefs and reviewing the record, we find no reversible error in the district court's judgment. The judgment of the district court is therefore AFFIRMED.1

The dissent raises two issues and, as to these issues, enunciates general principles. We do not so much disagree with the statements of general principles as with the certainty of the dissent that they have a precise fit in this case. This case is poorly briefed, and the record is incomplete. The majority is therefore unwilling to say anything other than that the district court committed no reversible error in affirming the bankruptcy court. We would observe that, in our opinion, it is not pellucid that Mr. Partain's charge of conspiracy between Texas State Bank ("TSB") and the debtor and/or the debtor's estate to deprive him of his counsel does not allege and relate to

liability on the part of the debtor's estate in connection with this adversary proceeding. Thus, based on what is before us, we will not say flatly that the bankruptcy court had no jurisdiction to address this claim. The claim, in any event, is patently meritless. Second, it is uncertain whether, at some point, the bankruptcy court may have acquired jurisdiction over the assets of the corporation given that the stock of the corporation is now solely controlled by the bankruptcy trustee, who apparently had control over the assets at all the relevant times herein. The record and law are clear, however, that Mr. Partain never had any interest in these assets at any time relevant to these proceedings. We are therefore satisfied simply to AFFIRM.
AFFIRMED.

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1 This opinion is published on the request of the dissenting judge.

EMILIO M. GARZA, Circuit Judge, concurring in part and dissenting in part:

I find it ironic that the majority states that my dissenting opinion merely "enunciates general principles," while resting its own decision (which includes no citation to legal authority) on the fact that the majority is simply "uncertain" as to the "precise fit" of these principles to the case at hand. These "general principles," which the majority fails to enunciate, are nothing other than the foundational principles of bankruptcy jurisdiction. While I admit that the briefing is poor, this difficulty does not authorize the majority's abdication of any meaningful review of the jurisdictional issues raised below. Therefore, I concur in the majority's affirmance except as to the following.

First, the bankruptcy court did not have subject matter jurisdiction over Partain's counterclaim against Texas State Bank ("TSB") in which Partain alleged that TSB intentionally created a conflict of interest with Partain's attorney in a prior case. The law is certainly pellucid - even

if the majority believes a claim to be "patently meritless" - that the bankruptcy court must have subject-matter jurisdiction before reaching the merits of a claim. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 95 (1998). "[B]ankruptcy courts are not courts of general jurisdiction and do not have jurisdiction over an action between non-debtors . . . unless that action is 'related to' the bankruptcy." In re Prescription Home Health Care, Inc., 316 F.3d 542, 547 (5th Cir. 2002); see 28 U.S.C. § 1334(b). "[A]n action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and . . . in any way impacts upon the handling and administration of the bankrupt estate." In re Walker, 51 F.3d 562, 569 (5th Cir. 1995) (internal quotation marks omitted). Any liability that might arise from this claim would be borne individually by TSB. Nothing in the record suggests that TSB's potential exposure would impact the Mapleses' bankruptcy estate. Because this claim between third parties has no conceivable effect on the bankruptcy estate, the bankruptcy court improperly resolved this claim over which it lacked subject matter jurisdiction. See In re Zale Corp., 62 F.3d 746, 753 (5th Cir. 1995).

Secondly, the bankruptcy court exceeded its statutory grant of jurisdiction over property when it placed Global Limo's corporate assets into the individual bankruptcy estate of the Mapleses. The bankruptcy court's jurisdiction over property is limited to "property, wherever located, of the debtor as of the commencement of such case, and [] property of the estate." 28 U.S.C. § 1334(e)(1). The Mapleses' property interests, unless otherwise dictated by the bankruptcy code, are determined by reference to state law. See Butner v. United States, 440 U.S. 48, 54-55 (1979). Even though the Mapleses were sole shareholders of Global Limo, they never owned Global Limo's corporate assets. See Trott v. Flato, 244 S.W. 1085, 1088 (Tex. Civ. App. 1922) (collecting cases). Despite forfeiture of its charter, the corporation still existed at the time the Mapleses filed for

bankruptcy. See Humble Oil & Ref. Co. v. Blankenburg, 235 S.W.2d 891, 893-94 (Tex. 1951). The forfeiture of Global Limo's corporate charter did not provide the Mapleses with any new ownership interest in Global Limo's property. As such, the Mapleses were never more than shareholders of Global Limo; and they did not have a property interest in Global Limo's corporate assets at the time they filed for bankruptcy.[1] Nor could the bankruptcy court have placed corporate assets into the Mapleses' estate through an avoided preference under 11 U.S.C. § 547(b). Any transfer of Global Limo's assets was not a transfer of a property interest held by the Mapleses. See In re Kelton Motors, Inc., 97 F.3d 22, 25 (2d Cir. 1996) (Under § 547(b), a trustee "may only seek those legal or equitable interests that the debtor would have held at the time of the petition but for the debtor's transfer of those interests."). Accordingly, Global Limo's corporate assets were neither property of the Mapleses at the time of filing nor property of the estate. To the extent that it placed Global Limo's corporate assets into the Mapleses' bankruptcy estate, the bankruptcy court exceeded the limits of its jurisdiction under § 1334(e)(1).

For the foregoing reasons, I would vacate the district court's judgment to the extent the bankruptcy court lacked jurisdiction under § 1334(b) and § 1334(e)(1). As such, I respectfully dissent from the majority's decision to affirm the district court judgment in its entirety.

---

[1] The only argument raised by the Mapleses to address this issue on appeal is that they became "beneficial owners" of Global Limo's corporate assets when the charter was forfeited. As noted above, the forfeiture of Global Limo's charter did not change the Mapleses' ownership interest in Global Limo's assets. Courts and leading treatises have recognized that a debtor's equitable or beneficial interest as a shareholder is insufficient to allow corporate assets to be placed in the debtor's bankruptcy estate. See Fowler v. Shadel, 400 F.3d 1016, 1018-19 (7th Cir. 2005) (collecting sources).

Entered June 3, 2008.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

JOHNNY PARTAIN	}	CIVIL ACTION
	}	NUMBER
VS.	}	M-07-016
	}	
MARVIN ISGUR	}	

ORDER OF DISMISSAL

On the 3rd day of October, 2007, came on to be heard the Defendant's Motion to Dismiss {Docket Entry Number 6}, and the Court, after having considered same, the pleadings on file, and statements of the parties, granted said motion for the reasons stated on the record. It is therefore,

ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Dismiss is hereby GRANTED, and Plaintiff's cause of action is hereby DISMISSED.

DONE on this 4th day of October, 2007, at McAllen, Texas.

Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

JOHNNY PARTAIN,	) CASE NO: M-07-CV-016
Petitioner,	) Civil
Vs.	) McAllen, Texas
MARVIN ISGUR, ET AL.)	Wednesday, October 3, 2007
Respondents.	) (2:50 p.m. to 2:55 p.m.)

HEARING ON MOTION TO DISMISS

BEFORE THE HONORABLE RICARDO H. HINOJOSA,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Petitioner:	JOHNNY PARTAIN, PRO SE
For Respondent:	DAVID LOUIS GUERRA, ESQ. Office of the U.S. Attorney 1701 W. Hwy. 83, Suite 600 McAllen, TX 78501
Court Recorder:	Antonio E. Tijerina
Transcribed By:	Exceptional Reporting Services, Inc. 14493 S. Padre Island Drive Suite A-400 Corpus Christi, Texas 78418-5940 361 949-2988

Proceedings recorded by electronic sound recording,
transcript produced by transcription service.

McAllen, Texas; Wednesday, October 3, 2007; 2:50 p.m.

(Call to Order)

THE COURT: Next is civil action number M-07-16, Johnny Partain versus Marvin Isgur and others.

MR. PARTAIN: Johnny Partain, the Plaintiff, your Honor.

MR. GUERRA: David Guerra, your Honor, on behalf of Judge Isgur.

THE COURT: Okay. This is a case where we're here on the issue of the Motion to Dismiss that's been filed on behalf of Mr. Isgur.

Last time we were here, Mr. Partain, I suggested to you that there seemed to be a pretty strong basis on the dismissal based on absolute immunity for judicial actions. I asked you to file some response to that. You have filed some response to that.

Is there anything either one of you wants to say further on this matter?

MR. GUERRA: I --

MR. PARTAIN: Go ahead.

MR. GUERRA: -- just want to make sure. We did file also a reply to his response --

THE COURT: Right.

MR. GUERRA: -- your Honor.

THE COURT: Right.

MR. PARTAIN: And there also is a evidence package that was submitted --

THE COURT: Right.

MR. PARTAIN: -- with the --

THE COURT: And I guess the argument could be made

that that should be stricken because it was late, but I will --
I did consider it so I'm not going to strike it. Anything else?
MR. PARTAIN: No, your Honor.
THE COURT: The problem for your standpoint of the case, Mr. Partain, is that all of the matters that you've complained about the Defendant here are in relationship to his action as a member of the Bankruptcy Court, as the Judge. It seems to be that you're more upset about the legal rulings of the Defendant, which have been appealed and affirmed already, and that all the complaints that I gather from -- granted it's a pro se filing on your part, but I did read them in light that one should read pro se's, because you represent yourself and you're not a lawyer; is that correct?
MR. PARTAIN: Yes, your Honor.
THE COURT: Okay. So I read them in that light as the law requires for me to try to give latitude with regards to somebody who represents themselves and read it as broadly as I can with regards to the claims that are made, realizing that you're not a lawyer. And I have to say that after going and

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reviewing these documents and your claims here, that it

does
2 appear to the Court that the Motion to Dismiss should be
3 granted because everything that you're complaining about
4 involves his action as a Bankruptcy Judge. And so, he has
5 absolute immunity for judicial actions.
6 There's nothing -- you complained about some other
7 parties, whether it's the bank or -- you also mentioned
some
8 other entities or parties -- well, Mr. Maples and the bank,
but
9 you sued Mr. Isgur. His actions with regards to either Mr.
10 Maples or the bank have been strictly as a result of
rulings in
11 a judicial matter. And so, therefore, he's acted as a
Judge
12 with regards to those actions. And so, therefore, he has
under
13 the law immunity for his actions as a Judge.
14 That doesn't mean that you have no recourse because
15 you can certainly appeal them -- appeal his rulings,
which you
16 did. And, I guess, have been affirmed by another Judge
on this
17 Court and that case is over.
18 And so, although there are a couple of other grounds
19 that are asserted by the Defense here, whether it's
qualified
20 immunity for discretionary actions or absolute immunity
for
21 Courts, my ruling is that my reading with regards to
your
22 complaints here and your pleadings are that this action
has to
23 be dismissed as a result of the fact that what you are

24 complaining about are actions that Mr. Isgur has taken as a
25 result of his being a Bankruptcy Judge and he has the benefit

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1 of absolute immunity for judicial actions. And I didn't see
2 anything in there that would take any of his actions that you
3 are complaining about outside of the realm of his actions as a
4 Judge. And so, therefore, the Court is going to grant the
5 Motion to Dismiss.
6 I did, Mr. Partain, read your pleadings as liberally
7 as possible in order to determine that there was a cause of
8 action, but I have to say that I was unable to find one outside
9 of his actions as a Judge.
10 Your complaint about Mr. Maples also and Texas State
11 Bank or their actions and what your concern is with regards to
12 them, however, any actions that Mr. Isgur took as a result of
13 them or those entities were as a result of his acting as a
14 Judge. And so, the Court's going to grant the Motion to
15 Dismiss.
16 If you all don't have anything else, you all can be
17 excused. And, Mr. Partain, I appreciate the fact that you did
18 file a supplemental briefing, which was an attempt to inform
19 the Court how you felt that this Motion to Dismiss should be
20 denied. From a legal standpoint, I wasn't able to

determine
and find that from what was filed here.
MR. PARTAIN: Well, I appreciate your efforts, your Honor.
THE COURT: If you all don't have anything else, you all can be excused. Thank you all very much.
(This proceeding was adjourned at 2:55 p.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above entitled matter.

Signed TONI HUDSON TRANSCRIBER August 14, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

JOHNNY PARTAIN	}	CIVIAL ACTION
	}	NUMBER
VS.	}	M-07-016
	}	
MARVIN ISGUR	}	

ORDER

On this day, came on to be considered Plaintiff's "Rule 60 Motion and Motion to Amend Petition and Motion for a New Hearing or to Alter and Amend Judgment" {Docket Entry Number 23}, and the Court, after considering said motion and all pertinent matters on file, is of the opinion that said motion should be and is hereby DENIED.

The Clerk shall send a copy of this Order to Plaintiff and counsel for Defendant.

Done on this 30th day of September, 2009, at McAllen, Texas.

Ricardo H. Hinojosa
United States District Judge

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

JOHNNY PARTAIN §

versus § CIVIL ACTION No. 7:07-016

UNITED STATES OF AMERICA; ET AL. §

ORDER STRIKING DOCUMENT

The Clerk has filed your First Amended Petition (D.E. #25); however, it is deficient as checked. (L.R. refers to the Local Rule of this District)

1. ☐ Document is not signed (L.R. 11.3).
2. ☐ Document does not comply with L.R.11.3.A.
3. ☐ Caption of the document is incomplete (L.R.10.1).
4. ☐ No certificate of service or explanation why service is not required (L.R. 5.4).
5. ☐ Motion does not comply with L.R.7
   a. ☐ No statement of opposition or non-opposition (L.R. 7.2).
   b. ☐ No statement of conference between counsel ((L.R. 7.1.D(1))
   c ☐ No separate proposed order attached (L.R. 7.1.C).
6. ☐ Motion to consolidate does not comply with L.R.7.6.
7. X Other: Leave of Court to amend pleading has not been granted. (FRCP 15a)

The document is stricken from the record.

Date: 9/30/09

HONORABLE RICARDO H. HINOJOSA
UNITED STATES DISTRICT JUDGE

CAUSE NO. CL-29,530-A

JOHNNY PARTAIN and	§	IN THE COUNTY
TERESA C. PARTAIN	§	COURT
	§	
VS.	§	
	§	AT LAW NO.1
	§	OF
	§	
JAMES H. MAPLES,	§	
INDIVIDUALLY and	§	
d/b/a GLOBAL TOURS &	§	
CHARTERS and	§	HIDALGO
KATHY MAPLES,	§	COUNTY,
INDIVIDUALLY and	§	TEXAS
d/b/a KBM BUS LEASING,	§	
INC. and KBM BUS	§	
LEASING, INC.	§	

TURNOVER ORDER NO. 5

Through this Court's jurisdiction over Judgment and Parties of the above styled and numbered cause and through Texas Civil Practice and Remedies Codes, especially Chapter 31, §31.002, Collection of Judgment through Court Proceeding, it is determined that the property and interests conveyed herein are in the possession, control, or ownership of the James Maples and Kathleen Maples (Maples herein), that the property cannot be readily attached or levied on by ordinary legal process, and that the property is not exempt from attachment, execution, or seizure of the satisfaction of liabilities. The Court issues this Order in respect to equity and consistency for this case.

IT IS ORDERED that all interests, rights, and authority to Global Limo, Inc. aka Atlas Transportation, Inc. are immediately conveyed to Johnny Partain on entry of this Order. Maples shall deliver all corporate records, documents, and communications to this Court's Clerk at Hidalgo County Courthouse, County Clerk's Office, 100 North Closner, Edinburg, Texas within 10 days of this Order. The Clerk shall store these documents until released by this Court.

IT IS ORDERED that Maples must take all actions necessary to consummate the entire Global Limo, Inc. corporation, including locating and delivering all assets and accounts of Global Limo, Inc. to Hidalgo County Sheriff's Office for release to Mr. Partain on behalf of Global Limo, Inc.; apprising all known interested parties to Global Limo, Inc. of Mr. Partain's authority and this Order; and providing Mr. Partain copies of these communications. Maples must account for all assets and accounts of Global Limo, Inc., must provide a comprehensive report of any missing assets and accounts of Global Limo, Inc. to Mr. Partain, and must take all actions to complete all reports and asset deliveries within 10 days of this Order.

IT IS ORDERED that all interests, rights, and authority to property described as -

> The East 18.41 feet of the West 60.82 feet of Lot 37, El Cazador Subdivision, Unit No. 2, an Addition to the City of McAllen, Hidalgo County, Texas according to map thereof recorded in volume 19, page 58 of the Map Records of Hidalgo County.

are immediately conveyed to Johnny Partain and Teresa Partain on entry of this Order. Maples shall take all actions necessary to apprise all interested parties of Mr. Partain's authority over the property and must deliver to this Court's Clerk all original agreements concerning the

property with any monies or deposits thereof. All Tenants must be immediately informed of Mr. Partain's authority. Maples must conform within 10 days.

IT IS ORDERED that failure to comply or interference with this Order may subject Maples to arrest and punishment for contempt of court.

Signed this day, August 18, 2008.

Judge Rudy Gonzales

JUDGE PRESIDING

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

In re:	§	
James H. Maples and Viginia Maples,	§	Case No. 05-70128
Debtors,	§	Chapter 11
	§	
James H. Maples and Viginia Maples,	§	
Plaintiffs,	§	
Vs.	§	
Johnny Partain and Teresa Partain	§	
Defendants,	§	

MEMORANDUM OPINION ON SUMMARY JUDGMENT

On December 20, 2005, a hearing was held on the parties' cross motions for summary judgment. For the reasons set forth below, the Plaintiffs Motion for Summary Judgment [docket no. 158] is granted in part and denied in part. Texas State Bank's Motion for Summary Judgment is granted [docket no. 155]. The transfers received by the Partains are avoided. Defendant's Motion for Summary Judgment [docket no. 161] is denied.

Summary Judgment Standard

"A motion for summary judgment is proper only if there is no genuine issue as to an material fact and the moving party is entitled to judgment as a matter of law." Pluet v. Frazier, 355 F.3d 381, 383 (5th Cir. 2004). The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portion of the pleadins and evidence that it believes demonstrate the absence of a genuine issue of material fact. Norman v. Apache Corp., 19 F.3d 1017, 1023 (5th Cir 1994). Material issues are those that could affect the outcome of the action. Wyatt v. Hunt Plywood, Co. Inc., 297 f.3d 405, 409 (5th Cir. 2002). Upon an adequate showing in a motion for summary judgment, the burden shifts to the non-moving party to establish a genuine issue

of material fact. Maldonado-Denis v. Castillo-rodriguez, 23 F.3d 576, 581 (12t Cir. 1994). The court then views the facts in light most favorable to the non-moving party. "... David's Health Care sys v. United States, 349 F.3d 232, 234 (5th Cir. 2003) (citing Wyatt, 297 F.3d at 409).

Preference

The fundamental issue that gives rise to this dispute is whether the pre-petition tranfers obtained by the Partain in a judgment issued by the Hidalgo County Court at Law No. 1 constitute an avoidable per-petition transfer. Section 547(b) of the Bankruptcy Code provides, [1] in relevant part:

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property-

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the Debtor before such transfer was made;

(3) made while the debtor was solvent;

(4) made-

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if –

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

While many of the facts, issues and motive surrounding

[1] All references to the Bankruptcy Code are to Title 11 of the United States Code as it existed on the date of the commencement of this proceeding. Subsequent amendments are not applicable to this lawsuit.

this case are seriously contested, the following facts are undisputed:

1. The Maples filed chapter 11 bankruptcy on February 16, 2005.
2. The Partains hold a judgment against the Maples. The Judgment (as finally amended) was issued by the Hidalgo County Court on February 27, 2003.
3. On January 27, 2005, the Hidalgo County Court Ordered that certain of the Maples' assets were Transferred to the Partains to satisfy, in part, the Partains' judgment.
4. January 27, 2005 is within the 90-day preference Period set forth in § 547(b)(4)(A).

Section 547(b)(1) requires that a transfer be to or for the benefit of a creditor. Based on the foregoing undisputed facts, the Court finds that the January 27, 2005 transfers were made to or for the benefit of the Partains.

Section 547(b)(2) requires that the transfer be made on account of an antecedent debt owed by the debtor before the transfer was made. Because the January 27, 2005 turnover order was made on account of the 2003 judgment, the finds that § 547(b)(2) is satisfied.

Section 547(b)(3) requires that the transfer be made a t a time when the debtor was insolvent. Section 547 (f) provides a rebuttable presumption of insolvency in the 90 day period preceding the date of the filing of the petition. Once the presumption of insolvency applies, the burden is on the respondent to prove that the debtor was solvent on the date of the transfer. In re Ramba, Inc., 416 F.3d 394, 403 (5th Cir. 2005). Mr. Partain argued that the various claims and debts listed in the Debtors schedules are inaccurate or unmatured as of the petition date, and are therefore not liabilities that should be considered in determining the Debtor's solvency. The Partain have presented no evidence to support these contentions.[2]

Instead, Mr. Partain incorrectly argued that the initial burden of proof was on the Debtor to prove it was insolvent.

2 When asked by the Court what the Partains believed the value of the Debtor to be, Mr. Partain responded that he could not ascribe a value because he only had the records and values provided by the Debtor before him.

Simply alledging that the Debtors' valuations are inaccurate is insufficient. The Partains have not offered any summary judgment evidence to rebut the presumption of insolvency. Section 547(f) provides a presumption of insolvency. This court would not be implementing the statute if it ignored that presumption and required the Debtors to offer proof of insolvency at a summary judgment hearing. The Partains declined to offer proof in this area; they fail to meet their summary judgment burden. Because the Partains failed to meet their burden of proof, the Court finds that the debtor was insolvent on January 27, 2005.

Section 547(b)(4)(a) requires that the transfer be made within 90 days of the filing of the petition if the transfer is to a non-insider. The January 27, 2005 transfer was made with 90 days of the filing of the petition, and the transfer was made to a non-insider.

Section 547(b)(5) requires that the creditor receive more than the creditor would receive in a hypothetical liquidation under chapter 7 of the Bankruptcy Code. In determining whether to grant a summary judgment, Federal Rule of Bankruptcy Procedure 7056(c) requires the Court to reach its decision based on the "pleadings, deposition, answers to interrogatories, and admissions on file, together with affidavits." FED.R.BANKR. P. 7056(c). The Maples have included persuasive evidence – unrebutted by the Partains – that the Maples' asset are highly unlikely to produce a 100% distribution to creditors. The Maples' schedules reflect that their debts far exceed their assets. The recently filed disclosure statement shows far fewer assets than total claims. The transfer to an

unsecured creditor provides that the creditor more than would be received in a hypothetical chapter 7 if the case will not make a full distribution to all creditors. In re Powerine Oil Co., 59 F.3d 969, 972 (5th Cir. 1995). Such is the case here. Accordingly, the Court finds that all elements of § 547(b) have been satisfied.

Nevertheless, a recipient of a transfer of the type described in § 547(b) may defend the transfer under any of the factors set forth in § 547(c). section 547(c) reads as follows:

(c) The trustee may not avoid under this section a transfer-

(1) to the extent that such transfer was –

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange;

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was –

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) Made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor-

(A) to the extent such security interest secures new value that was –

(i)given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii)given to enable the debtor to acquire such property; and

(iii) given to enable the debtor to acquire such property; and

(iv)in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 20 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor –

(A) not secured by an otherwise unavoidable security interest; and otherwise unavoidable transfer to ro for the benefit of such creditor;

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivables or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interest for such debt on the later of –

(A)

(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section apples, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title;

(7) to the extent such transfer was a bona fide payment of

a debt to a spouse, former spouse, or child of the debtor, for the alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that such debt –

(A) is assigned to another entity, voluntarily, by operation of law or otherwise; or

(B) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support; or

(8) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600.

Subsection 547(c)(1) provides a defense for certain contemporaneous exchanges of value. However, the payment of a debt does not constitute a contemporaneous exchange for value under § 547(c)(1). See § 547(a)(2). See, e.g., In re Inv. Bankers, Inc., 136 B.R. 1008, 1021 (Bankr. D. Colo. 1989)("if payment is received after the debt is incurred, this is payment of an antecedent debt").

Section 547(c)(2) provides a defense for certain payments made in the ordinary course of business. The circumstances surrounding this transfer are not in question. The transfer occurred pursuant to a court order to satisfy a judgment. I was not made in the ordinary courts of business.

Section 547(c)(3) provides a defense with respect to the creation of a security interest for new value. There was no security interest here and there was no new value. This defense fails.

Section 547(c)(4) provides a defense if the recipient provided new value back to the debtor after the date of the transfer. No such new value was provided here. This defense fails.

Section 547(c)(5) provides a defense for certain inventory liens. This defense is not relevant to the present transaction.

Section 547(c)(6) provides a defense for the fixing of a statutory lien. A statutory lien arises "solely by force of a stature on specified circumstances or conditions" and does not include a judicial lien. 11 U.S.C. § 101(53). No stator lien was created in this transaction. Accordingly, this defense fails.

Section 547(c)(7) provides a defense for certain types of domestic support payments. This defense is not relevant to this matter.

Section 547(c)(8) is limited to transfers of less than $600. This defense is not relevant here.

Because all of the potential defenses are inapplicable to the facts before the Court, the Court finds that the transfers made or contemplated by the January 27, 2005 turnover order are avoided.

Determination of Dischargeability

The Partains seek a determination that the debt owed to the Partains is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A), (2)(B), (4), (6), (7) and (11). Exceptions to discharge must be strictly construed against the objecting creditor and liberally in favor of the debtor. In re Davis, 194 F.3d 571, 573 (5th Cir. 1999); In re Boyler, 819 F.2d 583,588 (5th Cir. 1987.

Section § 523(a)(2) provides an exception to discharge for any debt:

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by –

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; [or]

(B) use of a statement in writing –

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor cause to be made or published with intent to deceive;

11 U.S.C. § 532(a)(2). For a debt to be nondischargeable under §523(a)(2), it must be shown that either (1) money, property or services, or an extension, renewal or refinancing of credit was obtained by false pretenses, a false representation , or actual fraud; or (2) the debt was obtained by the use of a false financial statement. 11 U.S.C. § 532(a)(2).

The Partains argue that the Maples fraudulently created Global Limo, Inc. and engaged in a scheme to transfer or encumber assets to prevent the Partains from collecting the Hidalgo County Court judgment. In support of their claim, the Partain offer evidence of the Maples' purchase of a ranch immediately proceeding bankruptcy and cite the Hidalgo County Court judgment which establishes Mr. Maples' wrongful conduct. It is undisputed that the Hidalgo County Court judgment was based on a finding of fraud. The preclusive effect of a state court judgment in a subsequent federal case is determined by reference to state law. In re Schwager, 121 F3.d 177, 181 (5th Cir. 1997). Under Texas law, collateral estoppel requires that: (1) the facts sought to be litigated in the second action were fully and fairly litigated in the prior action; (2) those facts were essential to the judgment in the first action, and (3) the parties were cast as adversaries in the first action. Id. While the Hidalgo County Court judgment may preclude the parties from relitigating the issue of Mr. Maples' fraudulent conduct, neither party has

submitted any findings of fact or conclusion of law from the Hidalgo County Court action. It is unclear whether money, property or services, or any type of credit was obtained by Mr. Maples' fraudulent conduct, or whether the fraudulent conduct related to a false financial statement. Plaintiff has not established the absence of a genuine issue of material fact with respect to each element under U.S.C. § 532(a)(2)(A) or (B). Accordingly, a fact issue remains and summary judgment is denied.

Section § 523(a)(6) provides an exception to discharge for any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." U.S.C. § 523(a)(6). To fall within this exception, the debt must arise from injury to an entity or property that is both willful and malicious. Id; In re Holt, 310 B.R. 675, 678 (Bankr. N.D. Tex. 2004). A willful injury requires a deliberate or intentional injury; a deliberate or intentional act that results in injury is not sufficient. Kawaauhau v. Geiger, 523 I/S/ 57, 61 (1998). Malicious means without just cause or excuse. In re Garner, 56 F.3d 677, 681 (5th Cir. 1995).

The Partains allege that the Maples' wrongful conduct in crating Global Limo, Inc. and transferring or encumberin assets to prevent the Partains from collecting the Hidalgo County court judgment support a determination that the debt should be excepted from discharge under 523(a)(6). The Maples disagree. The circumstances surrounding the Maples' purchase of the ranch are unclear. There is no evidence before this court that the Hidalgo County Court judgment was based on a finding that Mr. Maples' willfully and maliciously injured the Partains. It is unclear whether these issues were actually litigated in the state court action, and if so, whether they were essential to the judgment. Accordingly, a genuine issue of fact remains. Summary judgment is denied.

Section § 523(a)(4) provides an exception to discharge for any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4). The creditor bears the burden of proving that the debt falls with the § 523(a)(4) exception. In re Nicholas, 956 F.2d 110, 114 (5th Cir. 1992). To prevail under § 523(a)(4), the Partains must establish a fiduciary relationship. To qualify as "fiduciary" for debt dischargeability purposes, duties must have existed prior to, rather than by virtue of, any claimed misappropriation or wrong. In re Tran, 151 F.3d 339, 342 (5th Cir. 1998). The Partains' sole claim of ownership of Global Limo arises out of the transfers made pursuant to the January 27, 2005, Hidalgo County Court judgment. All of these transfers are avoided. Accordingly, the Partains have no standing, and the § 523(a)(4) claim is dismissed.

Section § 523(a)(7) provides an exception to discharge for certain fines, penalties or forfeitures that are payable to and for the benefit of a governmental unit. ." 11 U.S.C. § 523(a)(7). It is undisputed that the debt is owed to the Partain, two individuals. Accordingly, this provision is not relevant and summary judgment is granted in favor of the Debtors.

Section § 523(a)(11) provides an exception to discharge for any debt resulting from certain judgments, orders or settlement agreements when the debts arose "from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union." 11 U.S.C. § 523(a)(11). The Partains have presented no evidence that the debt at issue arose from fraud or defalcation committed by the Maples while they were acting in a fiduciary capacity with respect to a depository institution or insured credit union. Accordingly, this provision is not relevant and summary judgment is granted in favor of the Debtors.

Objection to Discharge

The Partains argue for the disallowance of Debtor's discharge under 11 U.S.C. § 727(a)(7). Section 727(a) states, in relevant part:

> The court shall grant the debtor a discharge, unless –
>
> (7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case under this title or under the Bankruptcy Act, concerning an insider;

11 U.S.C. § 727(a).

Section 727(a)(7) extends the basis for denial of discharge to a debtor's misconduct in connection with the bankruptcy of an insider. In re Krehl, 86 F.3d 737, 744 (7th Cir. 1996); In re Powell, 88 B.R. 114, 117 (Bankr. W.D. Tex. 1988). The purpose of §727(a)(7) is to bind "related cases together so that misconduct in one case by an individual may be chargeable against that individual in other related proceedings." Whiteside F.S. inc. v. Siefkin, 46 B.R. 479, 480-81 (Bankr. D.C. Ill. 1985), the Partains have not presented any evidence of any related bankruptcy proceed filed by an insider. Accordingly, § 727(a)(7) is inapplicable. Partial summary judgment is granted in favor of the Maples with respect to the § 727(a)(7) cause of action.

Claims by Partains

The Partains assert numerous theories of recovery. [3] For the purpose of completeness, the Court addresses each claim separately.

Fraud, Constructive Fraud and Fraudulent Transfers

These claims allege that Maples made transfers that diminished the size of his estate in order to stop the Partains from collecting amount owed to them. The Partains seek recovery both from Maples and from the alleged recipients of the transfers, primarily Texas State Bank. Claims that allege that the sized of the estate has been diminished are property of the estate. See

[3] The Partains also claim that Maples is unable to prove entitlement to a preliminary injunction. This appears to be an attempt be the Partain to re-litigate the issues previously adjudicated by the Court's May 19, 2005 order granting a preliminary injunction. This issue is properly before the Court as no motion to reconsider or request for injunctive relief is presently pending before this Court.

In re Educators Group Health Trust, 25 F.3d 1281, 1284 (5th Cir. 1994). The remedy for such claims is to pay money into the estate for an equitable distribution to all creditors – not just the Partains. The Fifth Circuit has repeatedly held that such claim may be asserted only by the estate's fiduciaries. See in re MortgageAmerica Corp., 714 F.2d 1266, 1272 (5th Cir. 1983). Accordingly, they have no standing to bring these claims. They must be dismissed for want of standing.

Conversion

This claim is asserted on behalf of Global Limo, inc. The Partains allege that Global Limo's assets were converted by Texas State Bank and the Maples. The Partains' sole claim of ownership of Global Limo arises out of the transfers made pursuant to the January 27, 2005 Hidalgo county Court judgment. Because all of those transfers are avoided, the Partains may not assert claims on behalf of Global Limo.

Intentional Interference with the Right to Pursue a Lawful Business

This claim is also asserted on behalf of Global Limo, Inc. The Partains allege that Global Limo's assets were converted by Texas State Bank and the Maples which interfered with Partains' ability to effectively operate the business. The Partains' sole claim of ownership of Global Limo arises out of the transfers made pursuant to the January 27, 2005 Hidalgo county Court judgment. Because

off of those transfers are avoided, the Partain may not assert claim on behalf of Global Limo.

Negligence and Gross Negligence

These claims originate in two principal ways.

First, the Partain claim that Texas State Bank intentionally created a conflict of interest with the Partains' attorneys on or about January 29, 2002. Texas State Bank offers the affidavits of its agents that it not engaged in alleged conflict. Texas State Bank also offers summary judgment evidence in the form of a judgment against mr. partain and in favor of his counsel on this same issue. Mr. Partain offers no competent summary judgment evidence in support of this allegation. Texas State Bank is entitled to summary judgment on this issue.

Second, the Partains claim negligence with respect to the handling of Global Limo's affairs and by assisting in the hiding and conversion of assets. For reasons set for above, the Partains have no standing to bring any of these claims.

Attorneys Fees

The Partains have not prevailed on any issue. They are not entitled to attorney fees.

Conclusion

The transfers received by the Partains pursuant to the Hidalgo County court judgment and orders are avoided. Texas State Bank's motion for summary judgment is granted. The Maples' motion for summary judgment is granted in part and denied in part. Partains' motion for summary judgment is denied. Trial will be limited to the issue of whether the debt owed to the Partains is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A), (2)(B), or (6). Trial will begin at 9:00 am on April 18, 2006 at the United States Bankruptcy Court, McAllen, Texas. All other relief is denied.

Signed at Houston, Texas, on January 26, 2006

Marvin Isgur, United States Bankruptcy Judg

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

JOHNNY PARTAIN,	) CASE NO: M-07-CV-092
Petitioner,	) Civil
Vs.	) McAllen, Texas
Warden Bravo,	) Friday, November 30, 2007
Respondent.	) (9:48 a.m. to 9:54 a.m.)

HEARING ON PENDING MOTIONS

BEFORE THE HONORABLE RANDY CRANE,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Petitioner:	JOHNNY PARTAIN, PRO SE
For Respondent:	ROEL ESQUIVEL, ESQ. 114 S. 12th Avenue Edinburg, TX 78539
Court Recorder:	Richard Cortez
Transcribed By:	Exceptional Reporting Services, Inc. 14493 S. Padre Island Drive Suite A-400 Corpus Christi, Texas 78418-5940 361 949-2988

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

McAllen, Texas; Friday, November 30, 2007; 9:48 a.m.
(Call to Order)
THE COURT: First, 07-CV-92, Johnny Partain versus Warden Bravo and others.
MR. ESQUIVEL: Roel Esquivel on behalf of Mr. Bravo.
THE COURT: Yes, sir.
MR. PARTAIN: Good morning), your Honor. I was just going to ask for a break, but --
THE COURT: Okay.
MR. PARTAIN: -- this is fine.
THE COURT: Well, good morning, Mr. Partain. This won't be long, as you know, I have another case ongoing and we've really finished -- or we've almost concluded our analysis.
Lots of issues, Mr. Partain, that you raised and we've really finished our briefing on all but one very significant issue, very good point that Mr. Partain raises and that's the issue of the fact that this condominium, that it was the subject of the preliminary injunction and the contempt order.
Mr. Partain has submitted documents that it was actually owned by Global Limo, Inc. who was not a party to the bankruptcy proceeding and, therefore, the argument that Mr. Partain makes is that the contempt order by the Judge was void ab initio. Or even the preliminary injunction order that

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preceded that, that formed the basis of the contempt

order, was
2 void ab initio because the Court didn't have jurisdiction over
3 this piece of property. It's conceded that Global Limo, Inc.
4 was not part of the bankruptcy, that -- also, that Mr.
5 Partain's wife, Teresa, was not part of the bankruptcy,
6 either. And that this, again, condominium was owned by - the
7 argument said Global Limo, Inc., but alternatively Ms. Partain
8 owned it as well. And so, there being no jurisdiction over the
9 property, not possible that Mr. Partain could be held in
10 contempt for appropriating or converting the revenues from that
11 condominium for those three or four months.
12 That is an argument that has received no responsive
13 briefing, Mr. Esquivel. I mean, there's nothing -- there was
14 no response made to that and it's a very difficult bankruptcy
15 argument. This Court is not a Bankruptcy Court. We don't see
16 these arguments frequently and so it takes us more time to
17 analyze them and we always look for the benefit of briefing
18 from Counsel, both sides. This has only been briefed by Mr.
19 Partain, not by the respondent. And so, what I'm going to do
20 today is order a response to that one issue because that's the
21 only issue that we have not concluded our briefing on.

22 The Court is very busy the next few weeks. I guess
23 that's to your benefit because I'm going to reset this for a
24 final hearing in January. And, Mr. Partain, you need do
25 nothing, your briefing's concluded.

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1 MR. PARTAIN: Thank you.
2 THE COURT: But I need a response to that one issue
3 the -- are you prepared to do that, Mr. Esquivel? I know
4 you're probably not a bankruptcy specialist either and
this is
5 a -- these are very difficult issues pertaining whether it's
a
6 core proceeding, you know, the reach of a bankruptcy
estate. I
7 don't know if you want to enlist co-Counsel or --
8 MR. ESQUIVEL: Your Honor, if I may. What I will do,
9 your Honor, is seek a bankruptcy attorney to assist me.
My
10 representation is to represent Warden Bravo.
11 THE COURT: Right.
12 MR. ESQUIVEL: Warden Bravo released Mr. Partain
13 and --
14 THE COURT: Right.
15 MR. ESQUIVEL: I'm here representing Warden Bravo.
16 THE COURT: Right. It's a temporary release. I know
17 you -- I think you might raise the point of mootness, or
18 someone did, but clearly this Court ordered the
temporary
19 release pending ruling on the Habeas Petition. And,
therefore,
20 Mr. Partain still faces jeopardy and so that argument
isn't
21 going to be dispositive and therefore we are reaching
these

22 other issues.
23 And so, you'll have about a month. I don't have the
24 exact date in January, it depends a little bit on what happens
25 at tomorrow's final pretrial -- I'm sorry, Monday's final

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1 pretrials. And so I'm just going to issue an order that'll go
2 out on Monday setting that date, but it'll likely be the first
3 week of January. It's probably going to be that first
4 Wednesday in January, but again, not sure.
5 Just look for that order. It'll go by mail to you I
6 presume, Mr. Partain, and electronically to you. But if you --
7 I need your briefing in really before Christmas. That gives us
8 a week or so to look at the issues before we have the hearing.
9 So it gives you three and a half weeks. You think you can get
10 it done by then?
11 MR. ESQUIVEL: Your Honor, I'll seek a Bankruptcy
12 Counsel today. Hopefully I'll have them onboard by Monday or
13 Tuesday.
14 THE COURT: I would think that, you know, that there
15 are plenty out there who aren't already involved in this case.
16 I mean, there's a lot of parties involved in this bankruptcy
17 already; a lot of lawyers are already been gobbled up but
18 probably there's still a few out there.
19 Okay. I'll issue the order today if -- or I'm sorry,

on Monday. If it looks like it's going to be later in the month on January, then I'll give you a little more time to get your briefing in. But I want briefing on just that one issue because we've decided everything else.

Okay. Thank you all for being here this morning.

MR. PARTAIN: Thank you, your Honor.

THE COURT: You're excused until January.

MR. ESQUIVEL: Thank you, your Honor.

MR. PARTAIN: Thanks, your Honor.

(This proceeding was adjourned at 9:54 a.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above entitled matter.

TONI HUDSON, TRANSCRIBER August 14, 2009